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www.international_shoe.com: Analyzing Weber v. Jolly Hotel's Paradigm for Personal Jurisdiction in Cyberspace

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I. INTRODUCTION

The unprecedented explosion of the Internet has singularly induced "the most profound transformation a technology has brought since the capture of fire."[1] A review of the exponential growth surrounding the Internet reveals some dizzying figures. In 1981 less than 300 computers were connected to the Internet.[2] Eight years later the number had only grown to about 90,000.[3] But by 1996 an estimated 9,000,000 computers worldwide were linked to the Internet.[4] The most staggering figure of all, however, is the estimated 200,000,000 computers which will be tapped into this remarkable global mine of information by the year 1999.[5] Recently, traffic on the Internet has been doubling every 100 days.[6]

Such expansive growth has created significant ramifications in the legal field. Among the hottest legal issues to roll off the information superhighway is the question of personal, or territorial, jurisdiction over Internet users. District courts across the country are being inundated with cases in which plaintiffs seek to use Internet-related activity as a basis for personal jurisdiction. Naturally, Internet users are "entitled to the [full] protection of the Due Process Clause, which mandates that potential defendants be able to 'structure their primary

1. *Internet Symposium: Legal Potholes Along the Information Superhighway*, 16 LOY. L.A. ENT. L.J. 541, 601 (1995) (statement of John Barlow).

2. *See* ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) (addressing a constitutional challenge to the Communications Decency Act of 1996; the district court does not give any source for the numerical figures which it provides). Some experts have predicted that by 2005 the number of people connected to the Internet may reach one billion! *See* SECRETARIAT ON ELECTRONIC COMMERCE, U.S. DEP'T OF COMMERCE, THE EMERGING DIGITAL ECONOMY 7 (1998).

3. *See ACLU*, 929 F. Supp. at 831.

4. *See id.*

5. *See id.*

6. *See* SECRETARIAT ON ELECTRONIC COMMERCE, U.S. DEP'T OF COMMERCE, THE EMERGING DIGITAL ECONOMY 2 (1998).

conduct with some minimum assurance as to where the conduct will and will not render them liable to suit.'"[7]

As recently observed in a Wall Street Journal article, however, Internet users are finding that this right is being trampled on. The article notes that several years ago "the Net's freewheeling, new-frontier style" made it "the kind of place where entrepreneurs could make deals, launch products and grow with a minimum of headaches."[8] But with the rise in litigation over cyberspace, "[t]he fear of lawsuits is turning the World Wide Web into a world of warnings."[9] This problem highlights the vital need of Internet users to know when and where their Internet activities will render them liable to suit. Is merely placing an informational web page on the Internet sufficient to establish personal jurisdiction? What about creating a web site which solicits business and allows users interactively to exchange information? And how should the jurisdictional issue be resolved in the case of a person actively conducting business over the Internet?

Further complicating the answers to these questions is the fact that cyber-jurisdiction cases rarely involve Internet contacts alone. Typically in these cases the defendant commits acts and makes contacts *in addition* to those made via the Internet. How should these additional contacts be factored into the jurisdictional equation? Thus far, the "development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages."[10] The decisions reached by the courts in response to such questions will thus have a profound impact on the continued development of the Internet—particularly the burgeoning financial activity being transacted there[11]—either by impeding or by fostering it.

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7. CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

8. Ann Davis, *Tangled Web: How the Net Became Land of Opportunity for Legal Profession*, WALL ST. J., Oct. 13, 1997, at A1.

9. *Id.*

10. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123 (W.D. Pa. 1997).

11. Dell Computers reported online sales reaching $6,000,000 *per day* in December of 1997. Another online marketplace, Auto-by-Tel, reported $1,800,000,000 in auto sales in 1996. By the end of November 1997, however, its sales had jumped to $500,000,000 a month, or $6,000,000,000 annualized. *See* SECRETARIAT ON ELECTRONIC COMMERCE, U.S. DEP'T OF COMMERCE, THE EMERGING DIGITAL ECONOMY

A September 1997 decision of the United States District Court for the District of New Jersey, *Weber v. Jolly Hotels*, developed an analytical model for addressing cases involving cyber-jurisdiction.[12] It proposed a three-tiered classification based upon a qualitative analysis of a defendant's contacts made over the Internet. This Note examines *Weber* and concludes that for the most part the court correctly interpreted and applied *International Shoe* and its progeny in adopting the three-tiered model. However, the *Weber* scheme is an inadequate yardstick for determining personal jurisdiction in cyberspace. Although the Weber model provides some help in analyzing the jurisdictional question, by itself it is incomplete and fails to provide sufficiently detailed criteria to enable a court applying it to distinguish between the differing *types* and the varying *degrees* of cyber-contacts.

Part II of this Note discusses the backdrop of the personal jurisdiction framework against which the issues of cyberspace jurisdiction must be resolved. Part III summarizes the facts and the court's reasoning in *Weber*. Part IV examines the *Weber* court's jurisdictional analysis in depth and assesses whether it conforms with the pre-existing *International Shoe* framework. After recommending a number of substantial modifications in Part V, this Note concludes that for reasons of public policy and fundamental fairness, courts should adopt a cyber-jurisdiction paradigm resembling this revamped and bolstered *Weber* scheme.

II. BACKGROUND

A. The Traditional Personal Jurisdiction Framework: International Shoe

Personal jurisdiction concerns the authority of a court to subject a person to binding adjudication.[13] More specifically,

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2 (1998).

12. *See* Weber v. Jolly Hotels, 977 F. Supp. 327 (D.N.J. 1997). It should be noted that the "*Weber* model" is almost identical to a model proposed earlier by a federal district court in Pennsylvania. *See Zippo Mfg. Co.*, 952 F. Supp. at 1119. Because the *Weber* model is so closely patterned after the *Zippo* model, the *Zippo* court likely should be given credit for developing the scheme which is the subject of this Note.

13. Personal jurisdiction should not be confused with subject-matter jurisdiction. "Subject-matter jurisdiction defines the court's authority to hear a given type of case,

personal jurisdiction is the geographical limitation that restricts where a defendant may be sued over a particular matter.[14] The notion of personal, or territorial, jurisdiction is a concept generally intuitive to the average American: A citizen happily residing in Wisconsin justly would be disturbed to learn that he was being haled into a Wyoming court if he had no prior contact with the state of Wyoming. This would neither be fair nor reasonable.

Not surprisingly, then, the Supreme Court has said that the Due Process Clause of the Fourteenth Amendment shields a person from a binding judgment in a foreign jurisdiction with which he has no meaningful "contacts, ties, or relations."[15] The purpose of this jurisdictional restriction is twofold. First, it is intended to prevent a plaintiff from suing a defendant in a foreign jurisdiction unless the defendant has established some relationship with that forum that would lead him to "reasonably anticipate" being sued there.[16] Second, it assures that the state courts "do not reach beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[17] While an exhaustive, in-depth treatment of personal jurisdiction lies beyond the scope of this Note, the following overview is necessary in order to evaluate how cyberspace jurisdiction fits into the pre-existing framework.

1. General versus specific jurisdiction

General and specific jurisdiction are two theories under which a court can assert personal jurisdiction over a nonresident defendant.[18] In discussing general and specific

whereas personal jurisdiction protects the individual interest that is implicated when a nonresident defendant is haled into a distant and possibly inconvenient forum." United States v. Morton, 467 U.S. 822, 828 (1984).

14. *See* Kulko v. Superior Court, 436 U.S. 84, 91 (1978); McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957).

15. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (holding that a "judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere").

16. *World-Wide Volkswagen*, 444 U.S. at 297.

17. *Id.* at 292.

18. When a state exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the state is exercising specific jurisdiction. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-64

jurisdiction, it should be remembered that the two theories are not discrete and unrelated; rather, they represent different points along a continuous jurisdictional spectrum.

a. General jurisdiction. The Supreme Court has said that general jurisdiction exists *only* when a defendant's contacts with the forum state are "continuous and systematic."[19] Under these circumstances, a defendant fairly may be required to litigate *any* dispute in the courts of the forum state, regardless of whether or not the particular dispute arises out of those contacts.[20] For example, a corporation may be sued at its corporate headquarters even if the forum state has no relationship with the claim.[21]

b. Specific jurisdiction. Specific jurisdiction, by contrast, arises out of a particular set of contacts made with the forum state. When general jurisdiction does not exist, specific jurisdiction allows a court to exercise personal jurisdiction over a nonresident defendant for forum-related activities where the relationship between the defendant, the forum, and the cause of action satisfies the "minimum contacts" test.[22] In order to satisfy specific jurisdiction requirements, the suit must be sufficiently *related* to the contacts made with the state.[23] In

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(1966). When a state exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the state is exercising general jurisdiction. *See* Calder v. Jones, 465 U.S. 783, 786-87 (1984); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80-81; von Mehren & Trautman, *supra*, at 1136-44.

19. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-16 (1984).

20. *See id.; see also, e.g.*, WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 25(A), at 56 (1984) (explaining that as the quantity of a defendant's contacts with the forum increases, a lesser connection between the cause of action and the forum is needed).

21. This so-called "center of business context" was aptly described by the Supreme Court as follows: "[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945); *see also* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-49 (1952) (holding that an Ohio court could exercise jurisdiction over a corporation whose operations in Ohio were continuous and systematic, even "where the cause of action arose from activities entirely distinct from its activities in Ohio").

22. *See* discussion *infra* Part II.A.3.

23. *See* Reynolds v. International Amateur Athletic Fed'n, 23 F.3d 1110, 1116 (6th Cir. 1994) (explaining that "[t]he cause of action must arise from the defendant's activities" with the forum state); CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1263

general, the more systematic and continuous the defendant's contacts with the forum, the less related to the suit the contacts must be.[24]

2. Determining when personal jurisdiction is appropriate

In determining whether it may properly exercise personal jurisdiction over an out-of-state defendant, a court must decide two separate issues: first, whether the forum state's long arm statute allows jurisdiction; and second, whether jurisdiction can be maintained without violating constitutional due process requirements.

The Due Process Clause of the Fourteenth Amendment defines the outer limits of a state's power to exercise personal jurisdiction.[25] Each state's legislature is free, however, to restrict personal jurisdiction even more than does the Due Process Clause through its long arm statute.[26] Typically, however, a state's long arm statute permits exercise of personal jurisdiction to the full extent allowed by the Due Process Clause of the Fourteenth Amendment.[27] Rule 4(e) of the Federal Rules of Civil Procedure provides that federal district courts may exercise personal jurisdiction over nonresident defendants to the extent allowed by the long arm statute of the state in which the court sits.[28] Consequently, as a practical matter, the majority of courts in the United States may exercise personal jurisdiction to the full extent of due process limitations.

(6th Cir. 1996).

24. *See, e.g.*, RICHMAN & REYNOLDS, *supra* note 20, § 25(A), at 56.

25. *See* Burnham v. Superior Court, 495 U.S. 604, 639 n.14 (1990) (Brennan, J., concurring) (discussing Justice Scalia's opinion that states may enact long arm statutes which extend the reach of their personal jurisdiction to the limits set forth by the U.S. Constitution).

26. Long arm statutes are "[v]arious state legislative acts which provide for personal jurisdiction, via substituted service of process, over persons or corporations which are nonresidents of the state and which voluntarily go into the state, directly or by agent, or communicate with persons in the state, for limited purposes, in actions which concern claims relating to the performance or execution of those purposes . . . ." BLACK'S LAW DICTIONARY 942 (6th ed. 1990).

27. Arkansas' long arm statute, for example, is representative of most states' long arm statutes: "The courts of this state shall have personal jurisdiction of all persons, and all causes of action or claims for relief, to the maximum extent permitted by the due process of law clause of the Fourteenth Amendment of the United States Constitution." ARK. CODE ANN. § 16-4-101(B) (Michie Supp. 1997).

28. *See* FED. R. CIV. P. 4(e).

3. The U.S. Supreme Court's "minimum contacts" analysis: the three-pronged test

In *International Shoe Co. v. Washington*, the Supreme Court articulated the following standard for exercising personal jurisdiction: "[D]ue process requires only that in order to subject a defendant to a judgment . . . he must have certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[29]

Over fifty years have now passed since the Court first articulated this "minimum contacts" test. Although the Court has subsequently refined it to some degree,[30] the minimum contacts test remains the touchstone of due process.[31] Whether or not a defendant has incurred the necessary minimum contacts is determined by a three-pronged test: (a) purposeful availment, (b) relatedness, and (c) reasonableness.

a. Purposeful availment. The first prong of the minimum contacts test examines whether the nonresident defendant has *purposefully availed* itself of the protections and benefits of the laws of the forum state.[32] Accordingly, courts look for an element of deliberateness[33] in whether the defendant has created a "substantial connection"[34] or "continuing obligations"[35] with residents of the forum state. The purposeful availment inquiry ensures that "random," "fortuitous," or "attenuated" contacts do not cause a defendant to be improperly haled into a forum.[36] For these reasons, "it is essential in each case that there be some act by which the defendant purposefully avails itself of

29. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

30. *See generally* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980).

31. *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604, 609 (1990) (citing *International Shoe* as the "classic expression of [due process] criterion").

32. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

33. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984) (holding that where defendant has "deliberately" engaged in significant activity within a state, the exercise of personal jurisdiction is appropriate).

34. McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) (noting that so long as it creates a "substantial connection" with the forum, even a single act can support jurisdiction).

35. *Burger King*, 471 U.S. at 475-76.

36. *Id.* at 475 (citing *Keeton*, 465 U.S. at 774).

the privilege of conducting activities within the forum State."[37] The heart of the purposeful availment analysis thus lies in determining precisely what activities the defendant engaged in that were directed toward the forum state.

b. Relatedness. The second prong of the minimum contacts test examines whether the claim being brought "arise[s] from the defendant's activities" within the forum state.[38] It focuses on whether the suit is sufficiently related to the contacts between the forum state and the defendant. The degree of relatedness required appears to be inversely proportional to the number of contacts made; that is, the greater the number and substantiality of the defendant's contacts with the state, the less related the contacts must be to the suit in order to satisfy this requirement.[39]

c. Reasonableness. The third prong of the test focuses on whether the court's exercise of jurisdiction is reasonable, so as not to offend "'traditional notions of fair play and substantial justice.'"[40] Reasonableness generally is satisfied by demonstrating a certain degree of foreseeability. "[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[41] This requirement is designed to protect the

37. *Hanson*, 357 U.S. at 253.

38. CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1263 (6th Cir. 1996) (quoting Reynolds v. International Amateur Athletic Fed'n, 23 F.3d 1110, 1116 (6th Cir. 1994)).

39. *See, e.g.*, RICHMAN & REYNOLDS, *supra* note 20, § 25(A), at 56.

40. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

41. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). The Supreme Court has identified five factors to be weighed in determining whether the exercise of jurisdiction is reasonable:

1. the burden placed on the defendant;
2. the forum state's interest in adjudicating the dispute by providing a forum;
3. the plaintiff's interest in obtaining convenient and effective relief;
4. the interstate judicial system's interest in obtaining the most efficient resolution of controversies;
5. the shared interest of the several states in furthering fundamental substantive social policies.

See id. at 292. Further, "[t]hese considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Burger King*, 471 U.S. at 477.

defendant "against the burdens of litigating in a distant or inconvenient forum."[42]

B. Application of the Supreme Court's Personal Jurisdiction Framework to the Internet

While the Supreme Court's personal jurisdiction doctrine appears relatively straightforward, applying it to novel scenarios involving the Internet has caused some notable head-scratching in the judicial ranks. A district court in New York frankly noted that "[t]he issue of personal jurisdiction and the Internet has split the federal district courts that have addressed the issue to date."[43]

1. Unique challenges faced in applying the personal jurisdiction model to the Internet

The unique physical characteristics of the Internet have caused it to push painfully against the outer limits of the Supreme Court's jurisdictional framework. Raising both national and international legal concerns, cyber-jurisdiction is such a thorny issue that some commentators have gone so far as to urge an extra-national legal system specifically tailored for disputes transcending jurisdictional borders.[44]

a. Internet activity differs significantly from normal life activity. As discussed, personal jurisdiction relates to defining the geographical reach of a court's jurisdiction.[45] For events that occur within discrete and well-marked state and international boundaries, this determination is often relatively straightforward. But, the Internet poses a rare conundrum. Because Internet communications occur in the nonterritorial, boundaryless, ethereal world of cyberspace, the notion of territorial or personal jurisdiction becomes much less clear.[46]

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42. *World-Wide Volkswagen*, 444 U.S. at 292.

43. Hearst Corp. v. Goldberger, No. 96 Civ. 3620, 1997 WL 97097, at *7 (S.D.N.Y. Feb. 26, 1997).

44. *See, e.g.*, David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (advocating a new legal mechanism for cyberspace). *But cf.* Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1 (1996) (suggesting that current minimum contacts analysis informed by new technology is adequate for cyberspace issues).

45. *See* discussion *supra* Part II.A.

46. *See generally* Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA.

After all, how is a court to apply rules focused on the territorial location of events when no physical territory is involved?[47] As one commentator astutely observed,

> The Internet breaks down barriers between physical jurisdictions. When a buyer and seller consummate a commercial transaction through a World Wide Web site, there is no need for the traditional physical acts that often determine which jurisdiction's law will apply and whether the buyer or seller will be subject to personal jurisdiction in the courts where the other is located.[48]

"Surfing" the Internet and entering into contracts over the Internet are not like crossing normal geographic boundaries and conducting normal business operations. Most Internet users simply are not aware of the geographical location of the other users with whom they interact.[49] Those surfing the Internet jump from one site to another with no real knowledge of the geographic boundaries they may be crossing.

For example, a mother in California who purchases a sewing machine by simply clicking a few icons on the Internet and entering a credit card number may not realize she has just entered into a contract governed by the laws of Michigan. If a dispute arose between the mother and the sewing machine vendor, the mother likely would be quite alarmed to learn that the vendor sought to drag her into a Michigan court. In contrast, a businesswoman who flies to Houston for a week of negotiations and meetings, and who eventually signs a contract under Texas law, would likely be far more aware of the potential to be haled into a Texas court. Because of these significant differences between cyberspace and the physical world, applying traditional personal jurisdiction laws to

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J. L. & TECH. 3, ¶ 6 (Spring 1997) <http://www.student.virginia.edu/~vjolt/graphics/vol1/vol1_*art3.html*>.

47. *See* ACLU v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) ("The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks.").

48. Bradley A. Slutsky, *Jurisdiction over Commerce on the Internet*, ¶ 5 (last modified June 6, 1997) <http://www.kslaw.com/menu/jurisdic.html> *cited in* Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456, 462-63 (D. Mass. 1997).

49. *See* Burk, *supra* note 46, ¶ 14 (observing that by its very nature the Internet is "technologically indifferent" to the physical location of its users).

Internet users can cause potentially undesirable and unfair results.

b. Balancing competing rights and interests—drawing lines in the right places. In developing the *International Shoe* framework over the past several decades, the Supreme Court has made clear that as technology increases, so also should the ability of courts to exercise jurisdiction.[50] The Court declared in *Burger King Corp. v. Rudzewicz* that, "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted."[51] Although the Court was not addressing the Internet at the time of its *Burger King* decision in 1984, the Court's declarations seem to indicate that its jurisdictional framework should be adapted to technological advancements such as the Internet. Even if no physical borders are crossed, a court still may exercise jurisdiction so long as the defendant purposefully has availed itself of the benefits and protections of the laws of the forum state.[52]

The challenge, then, is knowing just what constitutes "purposeful availment" in the context of the Internet. In grappling with this difficult issue, courts have sought to balance the increasing need to exercise territorial jurisdiction (due to modernization) with the right of an individual to utilize the Internet without improperly being haled into a courtroom on the other side of the country. On the one hand, parties "should not be permitted to take advantage of modern technology through an Internet Web page and forum and simultaneously escape traditional notions of jurisdiction."[53] On the other hand, Internet users—even those conducting *business* over the Internet—remain "entitled to the protection of the Due Process Clause, which mandates that potential defendants be able 'to structure their primary conduct with some minimum

50. *See* Hanson v. Denckla, 357 U.S. 235, 250-51 (1958) ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase.").

51. 471 U.S. 462, 476 (1985).

52. *See id.*

53. Edias Software Int'l v. Basis Int'l, 947 F. Supp. 413, 420 (D. Ariz. 1996).

assurance as to where the conduct will and will not render them liable to suit.'"[54]

Allowing overly broad jurisdictional power based on Internet activities may violate defendants' due process rights, as well as inhibit the Internet's immense potential for future growth—growth which will financially benefit the entire global market. But where should the line begin? And where should it end? In grappling with this cyber-jurisdiction dilemma, some lower courts have bought into questionable arguments articulated by those seeking to broadly extend personal jurisdiction into cyberspace. While these alluring arguments generally begin with a correct premise, they contain inherent flaws which lead to undesirable results.

2. *The argument to extend personal jurisdiction into cyberspace*

The arguments for increasing the jurisdictional reach over Internet activity typically are something along these lines: Whether a party purposefully directs its activities toward a forum, especially when deriving benefits from interstate activities, has always been a fundamental factor in personal jurisdiction cases.[55] Therefore, it would be unfair to allow individuals who purposefully engage in interstate activities for profit to escape accountability in those forums for the proximate consequences of those activities.[56] "Different results should not be reached simply because [those activities are] conducted over the Internet."[57] "[B]ecause cyberspace is without borders . . . a web site which advertises a product or service is necessarily intended for use on a world wide basis."[58] Parties using such sites "should not be permitted to take advantage of

54. CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

55. *See Burger King*, 471 U.S. at 472-73.

56. *See id.* at 473-74 (citing Kulko v. Superior Court, 436 U.S. 84, 96 (1978)).

57. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997); *see also* Hall v. LaRonde, 66 Cal. Rptr. 2d 399, 402 (Cal. 1997) ("The speed and ease of such [electronic] communications have increased the number of transactions that are consummated without either party leaving the office. There is no reason why the requisite minimum contacts cannot be electronic.").

58. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 415 (9th Cir. 1997). It is not unreasonable to posit that those placing materials on the Internet are generally aware that it can be seen by anyone around the world with access to cyberspace.

modern technology through an Internet Web page and forum and simultaneously escape traditional notions of jurisdiction."[59] Consequently, personal jurisdiction should be liberally extended to cover contacts incurred via the Internet.

While at first blush this line of logic seems convincing, a closer look reveals that embracing it would create devastating consequences. If personal jurisdiction were liberally granted merely because of Internet transmissions, the whole meaning of territorial jurisdiction would be undermined.[60] As the Ninth Circuit warned with regard to the intellectual property world, the disastrous result of extending jurisdiction in this fashion would be that "*every complaint* arising out of alleged trademark infringement on the Internet would automatically result in personal jurisdiction wherever the plaintiff's principal place of business is located."[61] While the federal circuit courts have recognized that jurisdiction is appropriate in cases of blatant commercial activity involving the Internet, they have adopted a tempered approach to further expanding jurisdiction in cyberspace. Nevertheless, some lower courts continue to reach widely divergent conclusions in their encounters with these issues. Two 1996 district court cases, one arising in California and the other in Missouri, serve as excellent foils in illustrating the disparity among lower court decisions.

The first case, *Maritz, Inc. v. CyberGold, Inc.*,[62] involved a California corporation, CyberGold, which set up a web site using the domain name "cybergold.com." Users visiting the site were encouraged to add their name to a mailing list in order to receive information about the corporation's Internet services. Maritz, a Missouri corporation, alleged that use of the "cybergold" trademark infringed on a similar trademark it already owned. Maritz consequently sought a preliminary injunction in Missouri enjoining Cybergold's use of the trademark. The court held that the ability of Missouri Internet users to access the California-based company's web site was *sufficient* to support personal jurisdiction over the California

59. Edias Software Int'l v. Basis Int'l, 947 F. Supp. 413, 420 (D. Ariz. 1996).

60. *See* McDonough v. Fallon McElligott, Inc., No. CIV. 95-4037, 1996 WL 753991, at *3 (S.D. Cal. Aug. 5, 1996) (warning that this "would eviscerate the personal jurisdiction requirement as it currently exists").

61. *Cybersell*, 130 F.3d at 420 (emphasis added).

62. 947 F. Supp. 1328 (E.D. Mo. 1996).

company which had no other significant contacts with Missouri.[63]

The *Maritz* decision stands in stark contrast to *McDonough v. Fallon McElligott, Inc.*,[64] a case which involved the alleged infringement of a copyrighted photograph. McDonough is a well-known photographer who claimed that a Minnesota advertising agency had unlawfully utilized one of his photographs. Seeking damages and injunctive relief, McDonough filed suit in a California district court. The court held that the ability of California Internet users to access the Minnesota-based company's web site was *insufficient*, by itself, to support personal jurisdiction over the company which had no other significant contacts with California.[65]

The inconsistent results reached by *Maritz* and *McDonough* underscore the pressing need for a uniform and equitable test for determining personal jurisdiction in cyberspace. Such a test not only would guide the lower courts, but also would allow Internet users to know which types of activity on the Internet will subject them to jurisdiction in a remote forum.

C. The CompuServe *Decision*

The Sixth Circuit 1996 holding in *CompuServe, Inc. v. Patterson* shed significant light on the cyber-jurisdiction quagmire.[66] This was the first federal circuit court decision that

63. *See id.* at 1333-34. The district court noted that the defendant used its web page to solicit Internet users, including Missouri residents (who had accessed the site 131 times), to sign up for its mailing list. This activity constituted not "passive" activity, but rather a purposeful availment involving "active solicitation" and "promotional activity." *Id.* at 1332-33. Based on this type of conscious solicitation, the court found that the defendant could reasonably have anticipated the possibility of being haled into a Missouri court. *See id.* at 1334.

64. No. CIV. 95-4037, 1996 WL 753991 (S.D. Cal. Aug. 5, 1996).

65. *See id.* at *2-3. Because the Web enables easy worldwide access, allowing computer interaction via the Web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists; the Court is not willing to take this step. Thus, the fact that Fallon has a web site used by Californians cannot establish jurisdiction by itself. *See Id.* at *3.

66. 89 F.3d 1257 (6th Cir. 1996). *CompuServe* remains the seminal case in the field. In December of 1997, the Ninth Circuit decided a cyberspace jurisdiction case, *Cybersell, Inc. v. Cybersell, Inc.*, in which the court closely followed the *CompuServe* rationale. 130 F.3d 414 (9th Cir. 1997). *See* discussion of *Cybersell infra* Part V.A. The Sixth and Ninth Circuits are presently the only two circuits which have directly ruled on due process in cyberspace. It should be noted that at the time *Weber v. Jolly Hotels*, the subject of this note, was decided, *Cybersell* had not been decided.

directly ruled on the requirements of due process in a cyber-jurisdiction case. CompuServe is an Ohio-based company that offers numerous software products to its subscribers through a program called "shareware."[67] Through this program, CompuServe markets both its own software and that of others, and enables its subscribers to "download" the software onto their own computers from its web page.[68] Patterson, a resident of Texas, was a subscriber who used CompuServe's shareware system to market his own software programs.[69] Although Patterson never visited Ohio, he and CompuServe entered into an agreement which provided, *inter alia*, that it was to be governed by Ohio law.[70]

Between 1991 and 1994 Patterson transmitted via computer thirty-two master software files to CompuServe in Ohio, which were then displayed to CompuServe subscribers over the Internet.[71] CompuServe thus essentially functioned as a distribution center from which Patterson marketed his products. When sales of Patterson's products were made in Ohio and elsewhere, the money was transmitted from CompuServe in Ohio to Patterson in Texas.[72] In total, less than $650 worth of Patterson's software was sold to twelve Ohio residents.[73]

When CompuServe began to market a product that Patterson felt was too similar to his own, he notified them by E-mail of their alleged infringement and threatened to commence litigation.[74] CompuServe then sought a declaratory judgment of noninfringement from an Ohio court.[75] The Sixth Circuit found

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The Second Circuit also decided a cyberspace jurisdiction case in 1997, but based its decision on the state long arm statute (which requires presence in the forum and is thus more stringent than due process) rather than a due process analysis. *See* Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997). The Eighth Circuit also decided a case which involved the Internet and personal jurisdiction, but did so in the context of tribal court subject-matter jurisdiction. *See* Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998).

67. *See CompuServe*, 89 F.3d at 1260.
68. *See id.* at 1260-61.
69. *See id.*
70. *See id.* at 1260.
71. *See id.* at 1261.
72. *See id.*
73. *See id.*
74. *See id.*
75. *See id.*

that Patterson's status as a software provider and marketer demonstrated that Patterson had knowingly reached out to Ohio and benefitted from CompuServe's services.[76] Specifically, the court noted that Patterson had advertised his software over the Internet and inserted it into the stream of commerce; had entered into a contract via the Internet which was governed by Ohio law; and had originated and maintained his contacts with Ohio for a period of several years.[77] The Sixth Circuit held that, based on these extensive acts, Patterson had sufficient contacts with Ohio to support the exercise of personal jurisdiction over him.[78]

CompuServe seemed to demonstrate that cyber-contacts could indeed serve as the basis for personal jurisdiction so long as the aggregate of the Internet activity and additional contacts rises to the level of purposeful availment. But even with this baseline guidance from *CompuServe*, lower courts have continued to struggle in defining the jurisdictional limits. To date the Supreme Court has remained silent on the matter. Against this background, *Weber v. Jolly Hotels*, a personal injury suit, arose in the Federal District Court for New Jersey.

III. *WEBER V. JOLLY HOTELS*

A. Facts

While a guest at an Italian hotel in December of 1994, New Jersey citizen Eileen Weber fell and sustained injuries.[79] The hotel at which Weber was injured, the Jolly Diodora Hotel, was owned by a corporation—Italjolly Compagnia Italiana Dei Jolly Hotels (hereinafter Jolly Hotels)–with its principal place of business in Valdagno, Italy.[80] Jolly Hotels owns and operates thirty-two hotels in Italy, and its independent subsidiaries own and operate hotels in Holland, France, Belgium, and New York.[81] Jolly Hotels does not conduct any business in New Jersey.[82] "However, it does provide 'photographs of hotel rooms,

76. *See id.* at 1266.
77. *See id.* at 1265-66.
78. *See id.* at 1268.
79. *See* Weber v. Jolly Hotels, 977 F. Supp. 327, 330 (D.N.J. 1997).
80. *See id.* at 329.
81. *See id.*
82. *See id.*

descriptions of hotel facilities, [and] information about numbers of rooms and telephone numbers' on the Internet."[83]

As a result of her injury at the Jolly Diadora Hotel, Eileen Weber filed a law suit in the Superior Court of New Jersey, alleging that Jolly Hotels knew or should have known of the dangerous condition on its premises. Subsequently, the case was removed on diversity grounds to the United States District Court for the District of New Jersey.[84] Jolly Hotels moved to dismiss the case for lack of personal jurisdiction.[85]

In response, Weber asserted that the court had personal jurisdiction over Jolly Hotels under theories of both general and specific jurisdiction.[86] Under the *specific* jurisdiction claim, Weber alleged that Jolly Hotels employed an independent travel agent, Grand Circle Travel, who clearly did business in New Jersey, and was thus subject to personal jurisdiction there.[87] Weber argued that Jolly Hotels stood in the shoes of Grand Circle Travel and therefore was itself subject to jurisdiction in New Jersey.[88]

Second, Weber contended that Jolly Hotels' use of the Internet was equivalent to advertising in New Jersey, and was thus adequate to establish *general* jurisdiction.[89] The court ultimately rejected both foundations for jurisdiction.[90] Because

83. *Id.* at 329 (quoting Brief for Plaintiff at 10).

84. *See id.* at 330.

85. *See id.*

86. *See id.* at 331.

87. *See id.* at 331-32.

88. *See id.* Weber asserted that a "foreign company is subject to personal jurisdiction in any court that has jurisdiction over the company's independent contractor, *when the company has given the independent contractor the exclusive right to solicit and sell its product*." *Id.* at 332. According to Weber's argument, the court had jurisdiction over Jolly Hotels since Grand Circle Travel, its independent contractor, solicited Weber with advertisements and brochures. The court rejected this argument on the ground that, *inter alia*, Grand Circle Travel did not have an exclusive right to solicit patrons for Jolly Hotels' rooms. *See Weber*, 977 F. Supp. at 332. Because this entire argument falls outside the scope of this Note it will not be addressed further.

89. *Weber* stated that: "This Circuit has consistently held that advertising in national publications 'does not constitute continuous and substantial contacts with the forum state.'" 977 F. Supp. at 333 (citing Gehling v. St. George's Sch. of Med., 773 F.2d 539, 542 (3d Cir. 1985)). Based on this position, that advertising in national publications does *not* confer general jurisdiction, the court flatly rejected Weber's argument that Jolly Hotels' advertising over the Internet granted general jurisdiction.

90. See *supra* notes 88 and 89 for an explanation of the court's rejection of the two jurisdictional bases.

the statute of limitations had expired and would have barred Weber's claim had the court dismissed it with prejudice, the court opted, in "the interests of justice," to transfer the case to the United States District Court for the Southern District of New York for a determination of whether New York had personal jurisdiction.[91]

B. The Court's Reasoning

The *Weber* court began by noting that the United States Supreme Court long has recognized that its personal jurisdiction framework must evolve with advances in technology, communication, and transportation.[92] In light of this, *Weber* concluded that the established principles of personal jurisdiction were adequate to resolve personal jurisdiction issues arising from the Internet.[93]

Weber then proceeded to quote an earlier cyber-jurisdiction decision by a federal district court in Pennsylvania, *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*[94] *Zippo* held that "the likelihood that personal jurisdiction can be constitutionally exercised is *directly proportionate to the nature and quality of commercial activity* that an entity conducts over the Internet."[95] Patterned after a sliding scale model used by the *Zippo* court,[96] *Weber* adopted a three-tiered classification system under which cases are categorized according to their level of commercial contact over the Internet:

Classification One: Cases in which "defendants actively do

91. *Weber*, 977 F. Supp. at 334.

92. *See id.* at 333 (citing Hanson v. Denckla, 357 U.S. 235, 250-51 (1958)).

93. *See id.* (citing CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)).

94. 952 F. Supp. 1119 (W.D. Pa. 1997).

95. *Weber*, 977 F. Supp. at 333 (quoting *Zippo*, 952 F. Supp. at 1124) (emphasis added).

96. *See id. Zippo* employed a "sliding scale" with one end of the spectrum allowing the exercise of jurisdiction and the other end not allowing jurisdiction. Between the two opposite ends of the scale is a substantial gray area. The "*Weber*" model is almost identical to this "*Zippo*" model, after which it was patterned. The only difference between the two is that *Zippo* is a sliding scale, while *Weber* is broken down into three specific classifications.

business on the Internet";[97]

Classification Two: Cases in which defendants operate an interactive web site with which users exchange information;[98]

Classification Three: Cases in which defendants simply provide information or advertisements on passive web sites.[99]

The *Weber* court ruled that, notwithstanding Weber's arguments to the contrary, "this case clearly belongs in category three."[100] Jolly Hotels had done no business whatsoever in New Jersey; it simply placed information about

97. *Weber*, 977 F. Supp. at 333.
98. *See id.*
99. *See id.*
100. *Id.*

its hotels on the Internet for advertisement purposes. Citing two other district courts that had ruled similarly,[101] *Weber* found that exercising jurisdiction over Jolly Hotels in this scenario "would violate the Due Process Clause of the Fourteenth Amendment[,] . . . would be unjust and would disrespect the principles established by *International Shoe* and its progeny."[102]

IV. ANALYSIS

A. A Befuddled Jurisdictional Analysis Which Ultimately Reaches the Correct Result

Based on the court's reasoning in *Weber*, it would appear that perhaps neither Weber's attorney nor the court was completely clear on what constitutes general jurisdiction. Although the court attempted to perform a separate, individual analysis for Weber's general and specific jurisdiction claims,[103] it conspicuously muddled the two. Under its *general* jurisdiction analysis, the court proposed its three-tiered classification structure—a model which logically would apply *only* to cases of *specific* jurisdiction. The court's classification model relied heavily on *CompuServe* and *Zippo*, both of which related exclusively to specific jurisdiction.[104]

Although *Weber* erred by conducting its specific jurisdiction analysis under the label of general jurisdiction, the court was correct in its ultimate ruling that general jurisdiction was

101. *See* Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356, 1365 (W.D. Ark. 1997) (holding that an advertisement in a trade publication on the Internet was an insufficient contact with the forum state (Arkansas) because it "did not contract to sell any goods or services to any citizens of Arkansas over the Internet site"); Hearst Corp. v. Goldberger, No. 96 Civ. 3620, 1997 WL 97097, at *10 (S.D.N.Y. Feb. 26, 1997) (concluding that advertising services on the Internet were equivalent to advertising in a national magazine, and that under New York law such advertisements did not satisfy requirements for personal jurisdiction).

102. *Weber*, 977 F. Supp. at 334.

103. *See id.* at 332-34 (containing the court's specific and general jurisdiction analysis).

104. *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1263 (6th Cir. 1996) (noting that since CompuServe based its action on defendant Patterson's act of sending software to Ohio for sale, CompuServe sought to establish *specific* jurisdiction over Patterson); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1122 (W.D. Pa. 1997) (noting that plaintiff "does not contend that [the court] should exercise general personal jurisdiction [but] concedes that if personal jurisdiction exists in this case, it must be specific").

inappropriate. General jurisdiction is customarily granted only at the headquarters of a corporate entity.[105] Jolly Hotels not only lacked a "center of business" operations in New Jersey, but it had *no* significant contacts whatsoever with the state. To have granted general jurisdiction based on such extremely limited contacts would "make a mockery of the limitations on state jurisdiction imposed by the Fourteenth Amendment."[106]

Weber's holding that a passive web site does not create general jurisdiction was, however, sapient. As a district court in California recently explained, to allow personal jurisdiction in such a case would be extremely dangerous because "a finding of personal jurisdiction . . . based on an Internet web site would mean that there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site."[107] The danger and absurdity of such a position is obvious: it would largely eradicate the foundation of personal jurisdiction.[108] Even though the court blundered by conducting its specific jurisdiction analysis under the title of general jurisdiction, the court's specific jurisdiction model itself is worthy of examination.

B. The Weber *Classification Scheme for Specific Jurisdiction: Incomplete and Vague, but a Strong Foundation on which to Build*

The next section of this Note focuses on whether the specific jurisdiction model propounded by *Weber* respects the Supreme Court's personal jurisdiction framework, and whether or not it is functional as a practical matter. In light of the fact that courts across the country are adopting a *Weber*-like analysis for

105. *See* International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945); *see also* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-49 (1952).

106. Kulko v. Superior Court, 436 U.S. 84, 93 (1978) (holding that basing California jurisdiction on 3-day and 1-day stopovers in that state "would make a mockery" of due process limitations on assertion of personal jurisdiction).

107. Hearst Corp. v. Goldberger, No. 96 CIV. 3620, 1997 WL 97097, at *1 (S.D.N.Y. Feb. 26, 1997).

108. *See* McDonough v. Fallon McElligott, Inc., No. CIV. 95-4037, 1996 WL 753991, at *3 (S.D. Cal. Aug. 5, 1996) (warning that worldwide jurisdiction based on the establishment of a web site "would eviscerate the personal jurisdiction requirement as it currently exists").

cyber-jurisdiction cases, the answers to these questions merit careful attention.[109]

1. *The* Weber *model is incomplete*

One of the inherent problems with the *Weber* model is that it is structurally incomplete. There is no question that even in cyberspace all three prongs of the minimum contacts test need to be addressed.[110] Yet a careful examination of the *Weber* model reveals that it fails to do so. The court seems to think that application of its model, with nothing more, is adequate for determining whether jurisdiction is appropriate in a given case. In actuality, however, the model indicates only whether the first prong of the minimum contacts test (purposeful availment) is satisfied. The *Weber* court seems unaware that its test completely neglects the second and third prongs of the test—relatedness and reasonableness.

2. *The three classifications of the* Weber *model*

The *Weber* model classifies cases into one of three groupings on the basis of a defendant's qualitative contacts with the forum state. Each of the three classes will be described and then analyzed to determine whether or not it satisfies the purposeful availment requirements of the Supreme Court.

a. Classification One: Defendants who actively conduct business over the Internet. Classification One includes cases in which "defendants *enter into contracts* with residents of a foreign jurisdiction that involve the *knowing and repeated transmission* of computer files over the Internet."[111] Defendants in this category consciously are engaged in conducting business in cyberspace.[112] *Weber* does not make clear which specific

109. *See generally, e.g.*, Scherr v. Abrahams, No. 97 C 5453, 1998 WL 299678 (N.D. Ill. May 29, 1998); Vitullo v. Velocity Powerboats, Inc., No. 97 C 8745, 1998 WL 246152 (N.D. Ill. Apr. 27, 1998); Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998); Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738 (W.D. Tex. 1998).

110. See Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1263 (6th Cir. 1996), and Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 416 (9th Cir. 1997), both of which use the same three-pronged minimum contacts test described above in the text; see also discussion *supra* Part II.A.3.

111. Weber v. Jolly Hotels, 977 F. Supp. 327, 333 (D.N.J. 1997) (citing Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1996) (emphasis added)).

112. *See Zippo*, 952 F. Supp. at 1124 ("At one end of the spectrum are situations

business activities would be included in Classification One. Presumably, though, acts such as selling services or tangible goods and entering into binding contracts all would be classified as "business" on the Internet. *Weber* holds that personal jurisdiction is generally appropriate in this class of cases.[113]

In order to test whether this classification satisfies due process requirements, it is necessary to make the following inquiry: Has a defendant who enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files purposefully availed itself of the protections and benefits of the laws of that foreign jurisdiction? As outlined by the Supreme Court, purposeful availment generally is satisfied when a defendant deliberately has created a "substantial connection" with the forum state.[114]

In looking for purposeful availment, the facts must be weighed to determine whether the requisite "affiliating circumstances" are present.[115] A party who "reach[es] out beyond one state and create[s] continuing relationships and obligations with the citizens of another state" likely has availed itself of that state's protections and benefits.[116] Entering into contracts with residents of a particular state which involve the knowing and repeated transmission of computer files seems to satisfy this requirement. Because the defendant specifically has targeted that particular state it seems fair that it should "reasonably anticipate being haled into court there."[117]

Nevertheless, the Supreme Court in *Burger King* stated that simply entering into a contract with an out-of-state party—without more—does not automatically establish sufficient minimum contacts.[118] The Sixth Circuit in

where a defendant clearly does business over the Internet.").

113. *See Weber*, 977 F. Supp. at 333.

114. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-75 (1985).

115. Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (quoting Hanson v. Denckla, 357 U.S. 235, 246 (1958)).

116. Defendants "who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King*, 471 U.S. at 473 (quoting Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647 (1950)).

117. *Id.* at 474 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

118. *See id.* at 478-79.

CompuServe held that this principle applies equally in cyberspace: "Admittedly, merely entering into a contract with CompuServe would not, without more, establish that Patterson had minimum contacts with Ohio."[119] Yet the *Weber* classification deems a defendant to purposefully have availed itself when it enters into contracts involving the "knowing and repeated transmission of computer files over the Internet."[120]

Perhaps in the majority of cases, defendants entering into such contracts involving knowing and repeated transmissions likely will have committed some additional acts that elevate them to the level of purposeful availment. However, because the definition of Classification One is so broad, it fails to adequately distinguish between parties who have simply contracted and those who have committed the requisite additional acts. It is certainly possible that some of the defendants who fall under Classification One may not have incurred such additional contacts. The overinclusive, broad-brush approach of Classification One is therefore unacceptable because it sweeps in too many defendants.

As for the utility of this classification, the fact that it focuses on whether or not business has been conducted is quite helpful. A court generally can ascertain whether a particular web site has been used specifically to derive revenue.[121] The portion of the definition which focuses on whether a defendant has engaged in knowing and repeated transmissions, however, is of less utility. This aspect of Classification One's definition is clearly derived from the specific fact scenario of *CompuServe*.[122] While perhaps helpful in some cases, such a case-specific definition cannot be easily applied to all of the varied fact patterns which arise in cyber-jurisdiction cases. In spite of this,

119. CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1265 (6th Cir. 1996) (citing *Burger King*, 471 U.S. at 478).

120. Weber v. Jolly Hotels, 977 F. Supp. 327, 333 (D.N.J. 1997) (quoting Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

121. *See, e.g.*, Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738, 741 (W.D. Tex. 1998) (involving a web site purporting to operate the "World's Largest Internet Casino").

122. Because *CompuServe* was the only circuit court guidance the lower courts had (up until *Cybersell* in December of 1997), it appears that *Zippo* and *Weber* simply based their categorization criteria on the specific fact scenario involved in *CompuServe*.

however, the model has widely been cited as the accepted mechanism for analyzing cyber-contacts.

b. Classification Two: Cases in which a defendant maintains an interactive web site allowing users to exchange information with the host computer. Classification Two encompasses defendants who make Internet contacts through an interactive web site. Cases falling within this classification lie in a difficult gray area. Seemingly, it would encompass any cyber-activity which does not rise to the level of entering into business contracts, yet constitutes more than mere advertising. The potential range of activities which involve the exchange of information via cyberspace appears quite broad.

Again, *Weber* essentially gives no guidance on what specific types of activities this would include. A survey of recent cases indicates that perhaps this classification may encompass, predominantly, interactive web pages that perform functions such as receiving a user's name, phone number, address, and an indication of interest.[123] While not entering into a contract in this scenario, the user may sign up to be placed on a mailing list, or receive some type of information by mail. Although not specifically mentioned by *Weber*, the distinguishing factor between these types of Classification Two situations and those of Classification One would be that no money changes hands. In such cases, "the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[124] According to *Weber*, personal jurisdiction *may or may not* be found in such cases.[125]

The focus of the court in Classification Two cases, as *Weber* spells out, should be on the *interactions*. More specifically, it should address *how much* interaction is going on and *what*

123. *See generally, e.g.*, Edberg v. Neogen Corp., No. 3:98CV00717, 1998 WL 458249 (D. Conn. Aug. 4, 1998) (involving a web site which contains a toll-free ordering number, and allows users to E-mail defendants with questions or comments); Scherr v. Abrahams, No. 97 C 5453, 1998 WL 299678 (N.D. Ill. May 29, 1998) (involving a web site which allows users to add their E-mail address to an address list so that information may be sent); Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998) (involving a web page which allows users to both directly E-mail defendant and request subscriptions to defendant's publications).

124. *Zippo*, 952 F. Supp. at 1124 (citing Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996)).

125. *See Weber*, 977 F. Supp. at 333.

kinds of interactions are involved. The "level of interactivity" appears to describe a quantitative analysis, looking at how many exchanges occur. The focus on the "commercial nature" of the exchange, in contrast, seems to denote a qualitative analysis. The "bottom line" question in deciding whether or not to exercise jurisdiction in this class of cases is whether the facts more closely resemble Classification One (actively entering into business contracts) or Classification Three (passive, informational web sites).

Because of the broad, ambiguous nature of Classification Two, it is difficult to determine whether or not it satisfies the Supreme Court's definition of purposeful availment. Here the deciding factor will likely be the non-Internet contacts. Certainly a simple interactive web page, if combined with other non-Internet contacts could rise to the level of purposeful availment.[126] However, it is also foreseeable that a court seeking to apply Classification Two's overly inclusive definition could sweep in defendants who had not committed acts rising to the level of purposeful availment. This distinct possibility would cause Classification Two to violate due process, and thus makes it unacceptable as a test for determining cyber-jurisdiction.

The usefulness of this classification is limited by the same factor which makes it unacceptable from a due process standpoint—its overreaching broadness. The definition gives no substantive criteria for determining when the exercise of jurisdiction is or is not appropriate in Classification Two cases. It is even less helpful since it fails to provide guidance on how non-Internet contacts should be figured into the equation. As a result of this, Classification Two's definition is of only marginal utility to Internet users and the courts. Internet users are not given sufficient guidance as to what cyber-activities will subject them to jurisdiction in a distant forum. And from a court's

126. *See generally, e.g.*, Hasbro, Inc. v. Clue Computing, Inc., 944 F. Supp. 34 (D. Mass. 1997) (holding personal jurisdiction to be appropriate over nonresident corporation on the basis of its interactive web site which stated that it would "go to any customer[']s site!"); Haelan Prods. Inc. v. Beso Biological Research, Inc., No. 97-0571, 1997 U.S. Dist. LEXIS 10565 (E.D. La. July 11, 1997) (holding personal jurisdiction to be appropriate based on three factors: (1) defendant's advertisements in national periodicals; (2) defendant's national toll-free telephone number; and (3) defendant's web site which advertised in an Internet mall).

perspective, even if a court correctly identifies which defendants should fall into Classification Two, the analysis is not finished since even within its own range of cases purposeful availment *may or may not* be satisfied. It is a difficult judgment call at best. In fairness to the *Weber* court, however, the U.S. Supreme Court itself has acknowledged the difficulty of making determinations involving the minimum contacts test.[127]

c. Classification Three: Cases in which defendants have simply posted information on an Internet web site which is accessible to users in foreign jurisdictions. Classification Three deals with passive web sites—those "that merely provide information or advertisements to users."[128] This class of cases typically involves Internet web pages that contain advertisements, promotional information, toll-free telephone numbers, E-mail addresses, or biographical data on a corporation, organization, club, or family. In essence, they are nothing more than billboards that can be seen around the world.[129] *Weber* holds that personal jurisdiction is generally not found in these cases.[130]

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127. *See* Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (quoting Estin v. Estin, 334 U.S. 541, 545 (1948) ("We recognize that this determination is one in which few answers will be written in 'black and white. The greys are dominant and even among them the shades are innumerable.'").

128. *Weber*, 977 F. Supp. at 333.

129. Such passive web sites are like billboards which merely provide information or advertisements to users. A passive web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. *See, e.g.*, Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997). However, some have pointed to the unique characteristics of the Internet which may distinguish it from traditional forms of communication. *See, e.g.*, Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 163 (D. Conn. 1996) (arguing that because they are "always accessible," passive web sites are stronger contacts than television, radio, and newspaper advertising); *see also* Christine E. Mayewski, *The Presence of a Web Site as a Constitutionally Permissible Basis for Personal Jurisdiction*, 73 IND. L.J. 297, 324-27 (1997) (arguing that because of the unique characteristics of a web site, those who use it in advertising are doing more than simply posting a billboard).

130. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997) (observing that personal jurisdiction is not appropriate because "[a]ll that [the defendant] did was post an essentially passive home page on the web"); *Weber*, 977 F. Supp. at 333; Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (observing that personal jurisdiction is not appropriate "where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions").

The lack of jurisdiction in Classification Three cases appears to be in harmony with the minimum contacts paradigm of the Supreme Court. The reason jurisdiction is not appropriate in these cases is quite simple: posting information on a passive web site accessible to anyone with Internet access lacks the fundamental element of "targeting." A defendant who posts such a page clearly has not reached out and directed his activity at a specific forum.[131] As a district court recently observed, because this type of passive advertising on the Internet "may be viewed by people in all fifty states (and all over the world too for that matter), . . . it is not targeted at the residents of New York or any other particular state."[132] Merely posting something on a web page does not constitute an activity by which one "reach[es] out beyond one state and create[s] continuing relationships and obligations with citizens of another state."[133] No substantial connection is created, no continuing obligation is established, and no specific benefits are derived from the posting of the web site.[134]

Passive web sites are akin to advertisements. Mere advertising in a particular forum—without more—generally is not sufficient to subject a defendant to personal jurisdiction.[135]

131. *See* Mallinckrodt Medical, Inc. v. Sonus Pharms., Inc., 989 F. Supp. 265, 272 (D.D.C. 1998) (holding that messages posted on the Internet ("AOL") were not being purposefully directed toward residents of the District of Columbia).

132. Hearst Corp. v. Goldberger, No. 96 Civ. 3620, 1997 WL 97097, at *10 (S.D.N.Y. Feb. 26, 1997).

133. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) (quoting Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647 (1950)).

134. *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321 (9th Cir. 1998) ("[N]o court had ever held that an Internet advertisement alone is sufficient to subject a party to jurisdiction in another state. . . . In each case where personal jurisdiction was exercised, there had been 'something more' to 'indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state.'" (quoting *Cybersell*, 130 F.3d at 418) (citation omitted)).

135. *See, e.g.*, Sunbelt Corp. v. Noble, Denton & Assocs., Inc., 5 F.3d 28, 33 n.10 (3d Cir. 1993) (holding single ad in national publication received in forum state insufficient); Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1199 (4th Cir. 1993) (holding that advertising and solicitation activities alone do not constitute the minimum contacts required for general jurisdiction); Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 181, 184 (5th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993) (holding no constitutional jurisdiction where defendant advertised in national journals distributed in forum and mailed information to prospective customers in forum); Williams v. Bowman Livestock Equip. Co., 927 F.2d 1128, 1131 (10th Cir. 1991) (holding advertising in multiple trade magazines insufficient to support general jurisdiction); Charlie Fowler Evangelistic Ass'n v. Cessna Aircraft Co., 911 F.2d 1564,

Thus, by analogy, passive web pages alone also should not be sufficient to subject a defendant to personal jurisdiction. To hold that such a defendant has purposefully availed itself of the privilege of conducting activities within the particular forum state is unfair and would violate due process, particularly when no contract or relationship has been created.

Weber's definition of Classification Three is much more helpful than the previous two definitions. Because courts and individuals experience little difficulty in recognizing "passive" web sites, this classification offers a safe harbor for those who seek to avoid being subjected to litigation in foreign jurisdictions. It is thus a useful standard for defining safe cyber-activity, and has consequently been accepted by nearly all courts.

3. The Weber *model, as a whole, is unacceptable*

Ostensibly the *Weber* model appears to be a bright line, categorical test for determining jurisdiction by neatly dividing cases into one of three classes. Several problems inherent in *Weber*'s structure and content undermine its validity, however. First, the *Weber* model is incomplete in that it does not adequately address all three prongs of the "minimum contacts" test. Second, *Weber* largely fails to provide guidance on how non-Internet acts should be factored into the cyber-jurisdiction equation. Third, the definitions of the classifications simply do not provide adequate guidance on how to distinguish between the three levels. For instance, what distinguishes a Classification One, "actively conducting business" case from a Classification Two, "interactive Web site" case? Further, the Classification Two definition holds that cases in that category *may or may not* constitute purposeful availment. What types of factors determine whether it does or does not? *Weber* simply

1566 (11th Cir. 1990) ("This court has held that an advertisement in a forum state newspaper . . . was not a 'purposeful availment of the benefits and protections of [the forum state's] laws'. . . ." (citation omitted)); Wines v. Lake Havasu Boat Mfg., Inc., 846 F.2d 40, 43 (8th Cir. 1988) (holding no jurisdiction based on advertisements in national trade publications); Cascade Corp. v. Hiab-Foco AB, 619 F.2d 36, 37-38 (9th Cir. 1980) (holding advertisement in national publications available in forum state insufficient for jurisdiction); Seymour v. Parke, Davis & Co., 423 F.2d 584, 587 (1st Cir. 1970) (holding advertising by mail in forum state insufficient contact for personal jurisdiction).

leaves one grasping for some detailed criteria with which to draw distinctions.

Because of the incomplete and nebulous nature of its three-tiered test, *Weber* would allow the exercise of jurisdiction in some cases where a defendant's conduct had not risen to the requisite level of purposeful availment. This would violate due process and thus militates against using *Weber* in its current state. Notwithstanding its shortcomings, the *Weber* model has some utility. It does provide a helpful mechanism for "translating" cyberspace contacts into the purposeful availment language of minimum contacts. If the inherent "bugs" in the *Weber* model could be worked out, the model would greatly assist courts faced with cyber-jurisdiction issues.

V. FIXING THE *WEBER* MODEL

The first problem with the *Weber* model is quite easily solved: the model's incompleteness can be overcome by simply augmenting it with an analysis of the second and third prongs of the minimum contacts test. Once a court has resolved the issue of purposeful availment by using *Weber*'s three classifications, it should then address the issues of relatedness and reasonableness. The "bolstered" *Weber* model would then be comprised of not just one prong of the minimum contacts test, but all three.

Weber's problems of having broad, vague categories and exhibiting a dearth of guidance on how to handle non-Internet contacts will require a more substantive modification of the model. Detailed criteria need to be developed to guide courts in knowing into which classification a defendant should properly be placed. Furthermore, a framework needs to be designed in which courts can analyze both a defendant's Internet and non-Internet contacts.

A. Establishing Detailed Criteria with Which to Measure Purposeful Availment in Cyberspace

Since the Supreme Court has not yet addressed cyber-jurisdiction, the most logical sources from which to obtain these descriptive criteria are *CompuServe* and *Cybersell*—the first and most influential circuit court opinions to have directly addressed the matter. An analysis of these two cases provides

some fundamental principles which help to flesh out the skeletal framework provided by *Weber*.

1. Revisiting CompuServe

As discussed above,[136] *CompuServe* involved an individual who utilized a software company to advertise and market his own software products. The individual, Patterson, never actually visited the forum state of Ohio.[137] Nevertheless, the Sixth Circuit found that Patterson had distributed his software through the Ohio-based CompuServe, entered into a contract governed by Ohio law, transmitted nearly three dozen software files to CompuServe via cyberspace, and deliberately maintained his contacts with CompuServe for several years.[138] *CompuServe* is instructive because it was the first circuit court opinion to substantiate the proposition that Internet activity may indeed serve as the foundation for the proper exercise of personal jurisdiction.

2. The guidance of Cybersell

Although not decided until after *CompuServe* and *Weber*, the Sixth Circuit's decision in *Cybersell, Inc. v. Cybersell, Inc.*[139] also provides guiding principles which can be used to strengthen and clarify the *Weber* paradigm. Cybersell, Inc. is an Arizona corporation (Cybersell AZ) which provides Internet advertising and marketing services.[140] In August of 1994 it filed an application seeking to register "Cybersell" as a service mark, which petition was granted in October of 1995. Cybersell AZ maintained a web site using the mark from August 1994 to February 1995. The web site was then removed from the Internet for reconstruction.[141]

In the meantime, a father-son team in Florida formed a corporation, Cybersell, Inc. (Cybersell FL), which provides business consulting services for strategic marketing on the

136. *See* discussion of *CompuServe supra* Part II.C.
137. *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1260-61 (6th Cir. 1996).
138. *See id.* at 1266-68.
139. 130 F.3d 414 (9th Cir. 1997).
140. *See id.* at 415.
141. *See id.*

web.[142] At the time Cybersell FL chose its name, Cybersell AZ did not have its home page on the web, and its application for the service mark had not yet been granted.[143] To further its marketing objectives Cybersell FL created a home page which contained a "Cybersell" logo, a local phone number, and an invitation for users to introduce themselves. To companies not yet on the web, but interested in getting on, the home page invited them to "Email us to find out how!"[144]

When Cybersell AZ discovered this Florida-based home page in November 1995 it sent an E-mail notifying Cybersell FL that it already owned the "Cybersell" service mark. Eventually Cybersell AZ filed suit in the District of Arizona "alleging trademark infringement, unfair competition, fraud, and RICO violations."[145] Cybersell FL responded immediately by seeking a declaratory judgment in a U.S. district court in Florida regarding use of the "Cybersell" mark. When the declaratory judgment was transferred to the District Court of Arizona for consolidation with Cybersell AZ's previously filed action, Cybersell FL moved to dismiss for lack of personal jurisdiction. The district court granted the motion to dismiss and Cybersell AZ filed a timely appeal.[146]

The Ninth Circuit found that because Cybersell FL had simply posted an essentially passive web site, and had not conducted commercial activity over the Internet with Arizona residents, it would be unreasonable to hold that it had purposefully availed itself of the benefits and protections of Arizona's laws.[147] Cybersell FL had done nothing to encourage people in Arizona to access its web site, had entered into no contracts in Arizona, and had made no sales in Arizona.[148] It thus deemed Cybersell FL's contacts with Arizona insufficient to establish purposeful availment and declined to assert jurisdiction over it in Arizona.[149]

142. *See id.*
143. *See id.*
144. *Id.* at 416.
145. *Id.*
146. *See id.*
147. *See id.* at 419-20.
148. *See id.* at 419.
149. *See id.* at 420.

3. Combining the teachings of CompuServe *and* Cybersell: *three underlying criteria*

At least three underlying criteria seem to be at the heart of the cyber-jurisdiction analyses conducted by the *CompuServe* and *Cybersell* courts. Both decisions look to whether a defendant (a) acted deliberately and purposefully; (b) reached out to or targeted the forum state; and (c) maintained or perpetuated the contact with the forum state. Each of these factors will be addressed in turn.

a. Deliberate and purposeful action by the defendant within the forum state. Both the *CompuServe* and *Cybersell* courts focused heavily on the defendants' levels of awareness and intent. Several words are pervasive in both opinions: deliberately, consciously, purposefully, intentionally, and knowingly. The rationale behind focusing on one's state of mind seems to be that the more cognizant a defendant is of its connection with the forum state, the less surprised it should be if haled into court there.[150]

CompuServe points out that Patterson *"chose* to transmit his software from Texas to CompuServe's system in Ohio,"[151] "*deliberately* set in motion an ongoing marketing relationship with CompuServe,"[152] and "*purposefully* transacted business in Ohio."[153] In contrast, the defendant in *Cybersell* made absolutely no *knowing* effort to target Arizona. Cybersell FL did not intend to target residents of Arizona any more than residents of any other state.

These observations reveal that courts addressing cyber-jurisdiction cases should carefully examine the defendant's level of cognizance. The fundamental question to be answered is whether the defendant knew or intended that his actions would create a significant connection with a particular forum, as opposed to any other forum. Conscious and purposeful actions by a defendant toward a particular forum cut strongly in favor of exercising personal jurisdiction there.

b. Reaching out to or targeting a particular forum by originating contacts with it. Perhaps the element of purposeful

150. *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1263 (6th Cir. 1996).
151. *Id.* at 1264 (emphasis added).
152. *Id.* at 1265 (emphasis added).
153. *Id.* at 1264-65 (emphasis added).

availment most readily observable by courts is the actual reaching out to or targeting of a forum by the defendant. Entering into contracts, subscribing to on-line services, or transacting business over the Internet are all prime examples of this. The utility of these physical acts is that they can serve as warning signs—both to defendants and to courts—that the specter of jurisdiction has been raised.[154]

(1) Justice O'Connor's "additional conduct" factors from Asahi. The acts of "reaching out" which both *CompuServe* and *Cybersell* focused on closely resemble the factors articulated in Justice O'Connor's plurality opinion from *Asahi v. Superior Court of California*.[155] In *Asahi*, the Supreme Court's landmark case discussing the stream of commerce doctrine for personal jurisdiction, a Japanese manufacturer of tire tube valves sold its product to a Taiwanese tire manufacturer.[156] The tire manufacturer subsequently placed this product in the "stream of commerce" by selling its tires on the worldwide market.[157] A product liability suit based on the allegedly defective tire tube valve was filed in a California state court.[158]

A sharply divided United States Supreme Court held that the exercise of jurisdiction by the California court over the Japanese valve manufacturer would be unreasonable and unfair.[159] Marked disagreement existed over the proper interpretation of the stream of commerce theory underlying this decision.[160] Of the three opinions handed down, the position articulated in Justice O'Connor's plurality opinion was the most restrictive.

Joined on this point by only three other Justices, she concluded that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the

154. By incurring these kinds of contacts, the *CompuServe* court noted, "Patterson deliberately set in motion an ongoing marketing relationship with CompuServe, and he should have reasonably foreseen that doing so would have consequences in Ohio." *CompuServe*, 89 F.3d at 1265.

155. 480 U.S. 102 (1987).

156. *See id.* at 106.

157. *See id.* at 106, 112.

158. *See id.* at 105-06.

159. *See id.* at 116.

160. "The stream of commerce theory is merely a type of specific jurisdiction." Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356, 1362 (W.D. Ark. 1997).

stream into an act purposefully directed toward the forum State."[161] Justice O'Connor suggested that some *additional activity*, above and beyond merely putting something into the stream of commerce, should be required in order to satisfy due process requirements. Such additional acts would include "designing the product for the forum state, establishing channels for providing customer advice in the forum state, and advertising, marketing, and distributing in the forum state."[162] In essence, each of these elements goes to targeting or singling out a particular forum.

(2) Applying Justice O'Connor's "additional conduct" factors in CompuServe *and* Cybersell. These factors serve as excellent criteria for gauging purposeful availment in cyberspace. Indeed, both *CompuServe* and *Cybersell* based their cyber-jurisdiction analyses on Justice O'Connor's *Asahi* stream of commerce theory,[163] and more specifically, on her "additional conduct" factors.[164]

The *CompuServe* court pointed out that "Patterson consciously *reached out* from Texas to Ohio to subscribe to CompuServe . . . ."[165] Subsequently "he entered into the Shareware Registration Agreement when he loaded his software" onto CompuServe's system.[166] Although there is no evidence that Patterson specifically designed his product for the Ohio market, he clearly used CompuServe to advertise there.[167] And while he may not have expressly established independent channels for providing advice to customers in Ohio, he certainly used CompuServe as his marketer and distributor.[168]

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161. *Asahi*, 480 U.S. at 112.

162. *Id.*

163. *See generally* Gwenn M. Kalow, *From the Internet to Court: Exercising Jurisdiction over World Wide Web Communications*, 65 FORDHAM L. REV. 2241, 2269-74 (1997) (arguing that Justice O'Connor's stream of commerce theory should be applied to the Internet); David L. Stott, Comment, *Personal Jurisdiction in Cyberspace: The Constitutional Boundary of Minimum Contacts Limited to a Web Site*, 15 J. MARSHALL J. COMPUTER AND INFO. L. 819, 838-44 (1997) (analogizing Justice O'Connor's "stream of commerce" theory to the Internet).

164. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418-20 (9th Cir. 1997); CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1265-67 (6th Cir. 1996).

165. *CompuServe*, 89 F.3d at 1266 (emphasis added).

166. *Id.* at 1264.

167. *See id.* (noting that "Patterson advertised and sold his product through [CompuServe's] system").

168. *See id.* (noting that "myriad others gained access to Patterson's software via

In contrast, the defendant in *Cybersell* reached out to Arizona only in the same way that it reached out to every other state—merely by posting a home page on the Internet. "It entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona, earned no income from Arizona, and sent no messages over the Internet to Arizona."[169] The *Cybersell* defendant committed none of the acts listed by Justice O'Connor. It did not design its product for Arizona, did not specifically advertise in Arizona, had no channels for providing customer advice in Arizona, and made no effort to market its product through a distributor in Arizona. As the Ninth Circuit sagely concluded, "[T]here is no question that anyone, anywhere could access that home page and thereby learn about the services offered, we cannot see how from that fact alone it can be inferred that Cybersell FL deliberately directed its merchandising efforts toward Arizona residents."[170]

c. Maintaining and perpetuating the contacts in the forum state. Another criteria upon which *CompuServe* and *Cybersell* relied was the continuity of the contacts. By affirmatively continuing its contacts with a forum, a defendant's awareness of the possibility of being haled into that particular forum should increase. These continued acts may be Internet related, such as repeatedly transmitting software files over the Internet, or non-Internet related, such as sending regular mail, placing phone calls, or making visits.

The *CompuServe* court focused on whether Patterson "originated and maintained" contacts with Ohio.[171] It found that Patterson had *repeatedly* perpetuated the contacts in various ways, and that his software was continually advertised on the CompuServe system. First, "Patterson frequently contacted Ohio to sell his computer software over CompuServe's Ohio based system."[172] Second, "Patterson repeatedly sent his 'goods' to CompuServe in Ohio for their ultimate sale."[173] Third,

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[CompuServe's] system"); *see also id.* at 1265 (observing that "CompuServe, in effect, acted as Patterson's distributor, albeit electronically and not physically").

169. *Cybersell*, 130 F.3d at 419.

170. *Id.*

171. *CompuServe*, 89 F.3d at 1266.

172. *Id.* at 1265.

173. *Id.*

Patterson "purposefully *perpetuated* the relationship with CompuServe via repeated communications"[174] in a way that was "intended to be ongoing in nature; it was not a 'one-shot affair.'"[175] An examination of *Cybersell* reveals a very different situation. Cybersell FL took no action to perpetuate or maintain its connection with Arizona.

Among the acts of perpetuation which a court should look for are those surrounding the filing of the actual law suit.[176] In *CompuServe*, for instance, Patterson "initiated the events that led to the filing of this suit by making demands of CompuServe via electronic and regular mail messages."[177] In *Cybersell*, however, defendant Cybersell FL apparently made no such initiation since it was in a defensive position; it simply filed a declaratory judgment action in response to Cybersell AZ's claim. Based on the courts' analyses, it seems reasonable to conclude that acts showing a furtherance of contacts by a defendant increase the likelihood that the exercise of jurisdiction is appropriate.

B. Designing a Framework Which Analyzes Both a Defendant's Internet and Non-Internet Contacts: Cybersell's *Recommended Structural Approach*

Weber provides three classifications into which defendants can be placed for purposes of determining personal jurisdiction. Notwithstanding, it fails to provide any substantive guidance on how a court should decide into which of the three classes the defendants should be placed. More particularly, it fails to provide instruction on how non-Internet contacts should be factored into its paradigm. *Cybersell* shines some instructive light on this issue.

Cybersell recognized that the proper analysis in cyber-jurisdiction cases should focus on the "broad spectrum of

174. *Id.* at 1264 (emphasis added).

175. *Id.* at 1265.

176. *See id.* at 1264.

177. *Id.* at 1266. After discovering CompuServe's competing software which he felt unlawfully infringed on his own products, Patterson "repeatedly sent both electronic and regular mail messages to CompuServe about his claim, and he posted a message on one of CompuServe's electronic forums, which outlined his case against CompuServe for anyone who wished to read it." Patterson "demanded at least $100,000 to settle the matter." *Id.*

Internet use on the one hand, and contacts with the forum on the other."[178] In practical terms this means that when a court is examining the three underlying criteria derived from *CompuServe* and *Cybersell*, it should look not only at the Internet contacts involved, but also at the non-Internet contacts.

1. Internet contacts—what exactly did the defendant do on the Internet?

In examining a defendant's activity involving the Internet a court should make both a qualitative and a quantitative analysis.

a. Qualitative analysis. The qualitative analysis will be twofold. First, it will look at the *interactivity* of the contacts (the degree of interaction) and second, it will probe the *nature* of the contacts (the type or kind of material involved).

(1) Interactivity. Interactivity is measured along a spectrum. On the one end are contacts which are completely passive in nature, such as an informational web page or advertisement. Interaction is limited to simply reading the material on such a site. These Internet sites typically provide information about a club, organization, family, or business.

On the other end of the spectrum are Internet activities which involve substantial interaction. In such instances, users may sign up for a particular service, make a purchase, or enter into a binding contract. In between the passive and substantial interaction extremities lie a broad range of points which involve some degree of interaction ranging from minimal to significant. Frequently, these interactions involve a user signaling an indication of interest in being placed on a mailing list or receiving some other type of information or service—either by phone, E-mail, or regular mail. This is done simply by entering a name, phone number, address (E-mail or regular), and some information about the user's interests.

In *CompuServe*, the level of interaction was extremely high. Patterson entered into a contract over the Internet and then used the Internet to transmit computer files to CompuServe.[179]

178. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 417 (9th Cir. 1997).
179. *See CompuServe*, 89 F.3d at 1260-61.

The two parties corresponded back and forth to a significant degree. In contrast, the parties in *Cybersell* essentially had no interaction over the Internet. "The interactivity of [the Cybersell FL] web page [was] limited to receiving the browser's name and address and an indication of interest . . . ."[180] It was not possible to sign up for any kind of services, make any purchases, or enter into any contracts.

(2) Nature of interaction. The primary focus when examining the nature of the interaction is the extent to which the contact is *commercial* in nature. The bottom-line question here is quite plain: Is money involved in the interaction? As with interactivity, the nature of the interaction may be viewed along a continuum. On one end are contacts in which absolutely no money is involved. Examples of this type of contact would include sending an ordinary E-mail, viewing an advertisement or other information posted on an electronic bulletin board, or simply visiting a passive web page. On the opposite end of the spectrum fall contacts which directly involve the transfer of money. Signing up for or offering services involving a charge, purchasing an item, and entering into contracts related to money are examples of this extremity. The nature of such contacts is primarily business.

In *CompuServe*, the nature of interaction between Patterson and CompuServe was fundamentally one of business. CompuServe served as a distributor for Patterson's software products. The two parties entered into a contract over the Internet which set forth the way in which this relationship would operate.[181] Patterson subsequently transmitted thirty-two master software files to CompuServe.[182] Patterson advertised his software on the CompuServe system. Subscribers to CompuServe would download software and then "pay the creator's suggested licensing fee if she use[d] the software beyond a specified trial period."[183] The subscriber paid the fee directly to CompuServe in Ohio, and "CompuServe t[ook] a 15% fee for its trouble before remitting the balance to the shareware

180. *Cybersell*, 130 F.3d at 419.
181. *See CompuServe*, 89 F.3d at 1260.
182. *See id.* at 1261.
183. *Id.* at 1260.

creator."[184] Thus, the nature of the interaction here was primarily business.

In *Cybersell*, however, the interaction more closely resembled a passive web site which involved no money. Cybersell FL posted an "essentially passive home page on the web."[185] Because no "money changed hands on the Internet" between the two parties, Cybersell FL "conducted no commercial activity over the Internet in Arizona."[186]

b. Quantitative analysis. Logically, the degree to which a defendant has purposefully availed itself of the benefits of the laws of a state should depend to some extent on the number of contacts it has made with residents of that state. Both the frequency of the contacts, as well as the duration of them, should be factored into the jurisdictional equation: How *often* were the contacts occurring, and *over what length of time* were they made? Were the contacts sporadic and inconsistent, or continuous and systematic? By noting the importance of having "continuing relationships and obligations" in order to satisfy the purposeful availment requirement,[187] the Supreme Court indicated that the *quantity* of contacts is indeed a factor in the jurisdictional equation.[188] Notwithstanding this, however, the Sixth Circuit in *CompuServe* unequivocally stated, "'It is the quality of [the] contacts,' and not their number or status, that determines whether they amount to purposeful availment."[189]

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184. *Id.*

185. *Cybersell*, 130 F.3d at 419.

186. *Id.*

187. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) (quoting Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647 (1950)).

188. While the commission of even a *single* act can support jurisdiction, so long as it creates a "substantial connection" with the forum, the likelihood that jurisdiction can be sustained should increase as the number of contacts multiplies. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957). A defendant who has entered into only one contract should not be thrown into the same class as one who has contracted hundreds or thousands of times with parties in the forum state.

189. *CompuServe*, 89 F.3d at 1265 (quoting LAK, Inc. v. Deer Creek Enters., 885 F.2d 1293, 1301 (6th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990)). The accuracy of this statement is belied by the reasoning of the *CompuServe* court itself. While ostensibly claiming that the quantity of the contacts is not what determines jurisdiction, the court proceeds to focus heavily on Patterson's having *"frequently* contacted Ohio," *"repeatedly* sent" his goods, *"perpetuated"* and *"maintained"* these contacts, and created an *"ongoing* marketing relationship" with CompuServe. *Id.* at 1264-66 (emphasis added). If the frequency or duration of contacts is not given weight in the jurisdictional equation, why is the court fixing its aim on precisely this aspect

2. Non-Internet contacts—What exactly did the defendant do in addition to making contacts via the Internet?

The portion of the analysis which examines the non-Internet contacts between the parties is relatively straightforward. As with the analysis for the Internet contacts, a court should conduct both a qualitative and a quantitative analysis. In looking for purposeful availment in this context the traditional purposeful availment analysis outlined by the Supreme Court should be used. The qualitative analysis typically will focus on contacts such as phone calls, letters sent via regular mail, advertisements in forum publications, contracts with residents (signed on paper, not over the Internet), and personal visits made to the forum state for meetings and negotiations.

The quantitative analysis of the defendant's contacts with the forum state should entail looking at both the frequency and duration of the contacts involved. With regard to frequency, the court would look to whether the defendant made contacts daily, or whether they were more sporadic, such as once or twice over a period of five years. In looking at duration, the court would examine whether the contacts extended over a period of days or weeks, or whether they transpired over a longer period such as several years.

3. Assembling the "bolstered" Weber model

The components necessary to bolster the *Weber* model are now ready to be incorporated. They include the substantive *Cybersell* framework, the three *CompuServe/ Cybersell* criteria, and the relatedness and reasonableness portions of the minimum contacts test. Once *Weber*'s three-tiered classification

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of the contacts? This kind of internal inconsistency damages the credibility of the *CompuServe* analysis. It is misleading and confusing not to simply acknowledge the need to examine the quantity of contacts involved.

Because *Weber* relies on *CompuServe*, it exhibits this same problem. *Weber* states that it focuses on the quality and nature of the contacts, making absolutely no mention of the quantity. In spite of this, a closer analysis shows that the court actually gives weight to quantitative as well as qualitative considerations. The court stated that it would consider whether a defendant had entered into contracts involving the "knowing and repeated" transmission of computer files. *See* Weber v. Jolly Hotels, 977 F. Supp. 327, 333 (D.N.J. 1997). By focusing on the number of times the defendant had sent files over the Internet, the court unwittingly acknowledges the need for some type of a quantitative analysis.

scheme is assimilated with these components, the "bolstered" *Weber* model is ready for use. Employing this revamped model is fairly straightforward.

In any given case, a court would first look at the specific contacts of a defendant in the forum by using the above *Cybersell* framework. This will involve examining the Internet and non-Internet contacts from both a qualitative and quantitative perspective. Particular focus will be made on the three underlying criteria derived from *CompuServe* and *Cybersell*: (1) deliberate and purposeful action in the forum, (2) reaching out to or targeting the forum, and (3) maintaining and perpetuating contacts in the forum.

This detailed, fact-sensitive analysis will guide a court in determining into which of the three *Weber* classifications a defendant properly should be placed. Once a defendant is placed in the *Weber* scheme, the model answers the question of purposeful availment. The final step is to round out the jurisdictional analysis by addressing the second and third prongs of the minimum contacts test—relatedness and reasonableness. Only when all three prongs of the minimum contacts test are satisfied is the exercise of personal jurisdiction appropriate.

C. The "Bolstered" Weber *Model*

From both the courtroom floor and academia have come clamors for an expansion of personal jurisdiction into cyberspace.[190] While the early trend in the federal circuit courts has been to withstand this siren call with a tempered approach to cyber-jurisdiction, many lower courts across the country are still struggling. The disparate decisions of the lower courts demonstrate that the guidance provided thus far—while on the right track—simply is not adequate. Injustice will occur if more detailed guidance is not provided, since some lower courts are opting to exercise jurisdiction in cases where defendants have

190. *See, e.g.*, *Mayewski*, supra note 129, at 327 (calling for "further expansion of the permissible scope of personal jurisdiction" in cyberspace, and favoring the exercise of jurisdiction over entities that merely "solicit business through a Web site"); Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 940 (1998) ("Any Internet contact, except perhaps a passive web site, should be sufficient to pass muster under the minimum contacts branch.").

done little more than post a passive web site on the Internet. The lines need to be more clearly drawn to protect parties who choose to use the Internet, but whose conduct does not rise to the level of purposeful availment set by the Supreme Court. The revised and substantiated *Weber* model helps draw these lines.

1. The bolstered and revised Weber *model is consistent with* International Shoe *and progeny*

The greatest benefit of the bolstered *Weber* model is, simply put, that it is fair. It respects the principles which the Supreme Court has articulated in its lengthy line of personal jurisdiction cases. By incorporating the three *CompuServe/Cybersell* criteria into the Internet/non-Internet framework recommended by *Cybersell*, a court has a viable tool with which to determine a defendant's proper place in the three-tiered *Weber* model. While the definitions of the three *Weber* classifications are perhaps overly broad when viewed in isolation, they are significantly clarified by the detailed criteria in the beefed-up analytical framework. Those defendants who are using the Internet and other means to derive significant financial benefit from a particular state will be held to have satisfied the purposeful availment requirements. Those who merely are posting information on the Internet will not improperly be yanked from the cyber-highway and pushed through the courtroom door in a foreign jurisdiction.

2. Bolstered Weber *is supported by public policy*

Not only is the modified *Weber* model a practical tool, but it is upheld by strong public policy considerations as well. One of the dangers of extending personal jurisdiction too far is that the potential liability of Internet users will be significantly increased. Some users essentially would be precluded from using the Internet for commercial purposes. Those opting to continue using the Internet would be forced to protect themselves by purchasing insurance, and the cost of Internet use would consequently rise. Increased operational costs ultimately would diminish the efficiency and utility of the Internet. Because of the enormous capacity for increased economic and social benefit to be derived from the Internet,

public policy strongly supports creating an environment in which the Internet can develop and flourish.

The revised *Weber* scheme will enable courts to attain a much greater degree of uniformity in their decisions. Further, the bolstered *Weber*'s paradigm provides fair warning to parties contemplating doing business over the Internet of what "conduct will and will not render them liable to suit."[191] This test provides more clear-cut guidelines for those deciding whether the potential liability of conducting activity on the Internet is outweighed by its benefits. Based on the test's guideposts, potential users can better gauge the risk that they will be haled into court in a foreign jurisdiction, and the corresponding level of interaction they are willing to undertake. By giving Internet users a clearer idea of what type of conduct may render them subject to suit in a given jurisdiction, the amount of litigation over cyber-jurisdiction will likely decrease.

3. *Bolstered* Weber's *potential drawbacks*

Of course, the bolstered *Weber*'s classification system is not without its imperfections. Inevitably, "borderline" cases will arise which will be difficult to classify. Some detractors may object that it is simply not possible to "pigeonhole" every Internet case into the *Weber* framework. However, these are all objections that could similarly be raised with regard to the normal personal jurisdiction framework under *International Shoe*. At the very least, bolstered *Weber*'s framework provides significantly greater fairness, predictability, and forewarning than would exist in its absence.

VI. CONCLUSION

The three-tiered model proposed by the *Weber* court is deficient because it does not adequately address all three prongs of the Supreme Court's minimum contacts test. Although the *Weber* scheme does provide help in addressing the first and most difficult prong of the test—purposeful availment—*Weber* fails to furnish adequate guidance on the specific types of contacts that comprise each of the three

191. *CompuServe*, 89 F.3d at 1262 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

categories. The broad classifications do not adequately allow potential defendants to structure their primary conduct with the requisite degree of assurance as to where they will and will not be rendered subject to suit.[192]

Further, the *Weber* classifications do not provide sufficiently detailed criteria to enable a court applying it to distinguish between the differing *types* or the varying *degrees* of cyber-contacts. In the end, the nebulous nature of *Weber*'s three-tiered test would allow the exercise of jurisdiction in some cases where a defendant's conduct had not risen to the level of purposeful availment. This would violate due process as defined by the Supreme Court, and thus makes the *Weber* model unacceptable. In spite of these shortcomings, however, the *Weber* model does serve as an excellent framework upon which to build. When the *Weber* paradigm is revised and substantiated with some structure and additional criteria, it produces uniform and fair results and provides an easily understood forewarning to Internet users.

The revised *Weber* model can be a tremendous boon to a court wrestling with cyberspace contacts. This model comports with the *International Shoe* due process framework. It also complies with and expands upon the Sixth and Ninth Circuit's *CompuServe* and *Cybersell* decisions. If lower courts will adopt an analysis like the bolstered *Weber* model, substantial uniformity and consistency will be achieved in the outcomes of cyberspace jurisdiction cases. The technological and financial growth of the Internet will progress unencumbered by overly broad assertions of jurisdictional power. Litigation also will be reduced since potential litigants will be more aware of what acts will subject them to jurisdiction in foreign arenas.

Although the bolstered *Weber* model appears practicable, the reality is that until the Supreme Court addresses electronic commerce on the Internet, some lower courts will continue to miss the mark. The Supreme Court would do well to accept certiorari on a cyber-jurisdiction case in the near future and adopt a rule similar to the one from *Weber v. Jolly Hotels* in its modified and bolstered form.

192. *See World-Wide Volkswagen*, 444 U.S. at 297 (discussing the importance of foreseeability on the part of potential defendants that they may be subject to a court's jurisdiction based upon their actions or connections with the particular state).

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